

1 on the other side about how to handle that.
2 Their request was that we take his deposition
3 in lieu of further testimony before Your
4 Honor, and we have agreed to that in an effort
5 to move things along. So, last night we
6 deposed Mr. Orszag. We have his deposition
7 here, which we can put in evidence, although
8 the better course might be for us to go
9 through and try to excerpt it on both sides.
10 I'm fine proceeding either way. We did
11 videotape it, so we would want to put in his
12 videotape of the deposition, which is not yet
13 available.

14 There was a related question
15 coming out of that, which is when I initially
16 raised our objection to Mr. Orszag's new
17 opinions, I said I had two concerns about it.
18 One was our ability to cross-examine him.
19 It's now clear to us what he has done, and
20 last night we were able to cross-examine him
21 on those opinions in the testimony that we'll
22 put before Your Honor.

1 The other concern we had was the
2 possibility of rebuttal testimony from Dr.
3 Singer. Dr. Singer has almost completed a
4 rebuttal report that we would like to provide
5 to the other side just addressing the new
6 issues that Mr. Orszag raised. And we have
7 not yet had a chance to talk with them about
8 it, because we've been trying to figure out if
9 this is something that makes sense on our
10 side. And we'll certainly confer with the
11 other side about this.

12 What we would propose, though, is
13 that Dr. Singer be handled the same way Mr.
14 Orszag was, where if they want to depose him
15 on the report they can, and that can go in on
16 a limited basis.

17 JUDGE SIPPEL: So, that's really
18 premature to make any kind of ruling on it
19 until you get the package.

20 MR. SCHMIDT: I think that's
21 right. We just wouldn't want the record to
22 close without having the chance to --

1 JUDGE SIPPEL: Oh, it'll be open
2 for that. That's perfect.

3 MR. CARROLL: Your Honor, we would
4 note, it's got to come to an end at some
5 point. And we made Mr. Orszag available
6 yesterday for the deposition, even though,
7 unfortunately, it was a day -- his father
8 having passed away yesterday, but he still sat
9 for his deposition.

10 His deposition, I have no
11 objection to being introduced into the record.
12 But the idea that Mr. Singer now has another
13 report he now wants to offer us that we've
14 never seen, haven't heard about, don't know
15 anything about, I think that's a round too
16 many, because then what? Then we're supposed
17 to look at that, and maybe Mr. Orszag would
18 like to comment on that again?

19 The way we got into this
20 situation, and if you want a little briefing
21 on this, that might be fine. Remember it was
22 Dr. Singer who came in with a new opinion at

1 the time of trial that had not been subject to
2 deposition. And we responded to that by
3 having Mr. Orszag rebut that with some
4 opinions that, in fairness, the other side had
5 not had an opportunity to thoroughly explore
6 and cross-examine.

7 They have now had that opportunity
8 with Dr. Singer's able assistance. He was
9 there at the deposition yesterday, I
10 understand, with all counsel on the other side
11 having at Mr. Orszag.

12 I think the idea now that Dr.
13 Singer goes again and comes in with still
14 another new opinion is a round too many, and
15 we would object to that.

16 MR. SCHMIDT: And just so Your
17 Honor has --

18 JUDGE SIPPEL: Thank you. Go ahead.

19 MR. SCHMIDT: Yes. Just so Your
20 Honor has our position on that, the round too
21 many, in our view, was when Mr. Orszag came
22 forward the night before his testimony and

1 gave a paragraph that we couldn't figure out
2 what he was saying, other than that he
3 disagreed with Dr. Singer. Then testified
4 further about that the next day for the very
5 first time after the date for the written
6 testimony.

7 There was a date for written
8 directs. His opinion came well after that
9 date, the evening, I believe it was 9:40 or
10 something like that before his testimony. He
11 then testified on that. And our initial
12 argument was that was the round too many. And
13 Mr. Carroll's response was, Your Honor, let it
14 come in, and they can take his deposition. At
15 the time I said well, that presents issues in
16 terms of will we need rebuttal testimony from
17 Dr. Singer? And Mr. Carroll didn't object to
18 that at the time.

19 What we now know from having
20 deposed Mr. Orszag is, and this was a point of
21 real disagreement between us at the
22 deposition, is when I heard Mr. Orszag testify

1 on the stand, I heard him to say I've
2 replicated the FCC's analysis as to Golf and
3 Versus alone.

4 What we found out last night, and
5 what we discovered as we looked into his
6 opinions is, he only did that for half of the
7 analyses. The FCC did two different types of
8 analyses. He replicated one, and he did not
9 attempt to replicate the other.

10 So, from our point of view, it
11 would be fundamentally unfair for Comcast to
12 be able to bring in on the eve of testimony
13 opinion on one of those issues, and for us,
14 now that we understand what it is and what
15 he's done, for us not to be able to respond.

16 I think at the end of the day,
17 Your Honor hit it the right way, which is that
18 it is premature. I would propose that we
19 serve the report in the morning. If Mr.
20 Carroll wants to object, he can object, and we
21 can deal with it through briefing that can
22 come in in connection with the post-trial

1 briefing. And that will include our briefing,
2 if that's Mr. Carroll's response, to strike
3 Mr. Orszag's new opinions.

4 But we're asking for an even
5 playing field, which is if he's allowed to
6 come in and say half of what the FCC did I
7 have reversed, we should be able to come in
8 and say here's the other half of the equation.

9 JUDGE SIPPEL: Which you did not
10 reverse. Is that the idea?

11 MR. SCHMIDT: Which when you run
12 it just looking at Golf and Versus very
13 clearly shows that Comcast is discriminatory
14 in favor of Golf and Versus.

15 JUDGE SIPPEL: Well, couldn't you
16 do that in proposed findings?

17 MR. SCHMIDT: We could do that in
18 proposed findings, but it would have to be
19 based on some record from Dr. Singer. And
20 that record does not yet exist, because this
21 was only put at issue through Mr. Orszag's
22 testimony, where the night before his

1 testimony he didn't say this was what he was
2 doing. And then as I understood him at his
3 testimony, he claimed he had reversed, as I
4 understood it, I might have misunderstood it,
5 but he claimed he had reversed all of the
6 FCC's findings. Last night we found out he
7 had redone one, and not the other.

8 JUDGE SIPPEL: Well, if that's
9 what happened, it seems to me you've got
10 several ways in which you can attack it in
11 findings. If he left it out --

12 MR. SCHMIDT: Yes.

13 JUDGE SIPPEL: -- or if he
14 misstated himself, why bring Dr. Singer in to
15 straighten it out?

16 MR. SCHMIDT: Dr. Singer is not
17 going to straighten it out as to what Mr.
18 Orszag did. His focus is on what Mr. Orszag
19 didn't do. There's nothing right now in the
20 record on that specific analysis, which is the
21 second FCC analysis of Golf and Versus.

22 MR. CARROLL: Your Honor, I'll

1 just note, Dr. Singer had an eternity. In
2 fact, his direct testimony was all about,
3 that's what I crossed him on you'll remember,
4 his own replication of what he said the FCC
5 had done.

6 This isn't new for Dr. Singer. He
7 wants another go at it after the bell here.
8 And I agree with Your Honor's question just
9 then. I don't agree with counsel's
10 representation about Mr. Orszag, we'll have at
11 it, as to what he said. But it sounds like
12 you're already in a position to offer their
13 criticism about Mr. Orszag's analysis, and if
14 it's half a loaf, and they're right, it'll be
15 half a loaf. I don't agree with their
16 approach.

17 They don't get to have Mr. Singer
18 bake a brand new loaf on an issue that's been
19 in Mr. Singer's -- that Dr. Singer started by
20 injecting it into his own opinion, and that I
21 thoroughly cross-examined him about. Your
22 Honor will remember that, what the basis was

1 for his conclusion that he had duplicated what
2 the FCC did.

3 It sounds like now Dr. Singer
4 knows he didn't do it, and he wants to remedy
5 that. I do object to that, and I think that
6 they're not -- they're in an able position now
7 after Mr. Orszag's deposition to weigh in and
8 criticize in any degree.

9 I'll note one other thing. The
10 two sides have negotiated a proposed, it's all
11 subject to Your Honor, of course, stipulation
12 for post-trial briefings. The two sides did
13 this yesterday, and I thought had agreed on a
14 schedule. That schedule has no allowance in
15 it for more depositions, more expert reports,
16 or anything. This is the first I'm hearing
17 this.

18 This schedule that we negotiated
19 would be thrown in abeyance, because if
20 they're going to put in a new report, new
21 deposition, the schedule they wanted would
22 have us, basically, submitting proposed

1 findings to Your Honor by May 27th. And we had
2 negotiated and agreed on that before we
3 started today. And there was no provision in
4 this schedule that we agreed for anything
5 more.

6 And I just think again, Your
7 Honor, given the subject matter, and the fact
8 Dr. Singer had all the time he needed to
9 satisfy himself that he thought he knew what
10 the FCC had done and to opine on that already,
11 he wants another go around on this. And I
12 don't think he gets to rebake his opinion now.
13 And they've had fair opportunity to cross-
14 examine Mr. Orszag.

15 MR. SCHMIDT: Your Honor, we had
16 nothing vacant in the schedule for Sunday
17 night, the last day of trial, the deposition
18 of Mr. Orszag, because the night before his
19 testimony he gave a paragraph that was
20 purportedly in rebuttal to Dr. Singer, but
21 that included analyses that Dr. Singer had not
22 done. They were new analyses that we were

1 only able to unwind last night in his
2 deposition.

3 What we're asking for is a fair
4 standard. Mr. Carroll has able to introduce
5 the testimony from Mr. Orszag after the
6 deadline that he wants to introduce. We're
7 asking for the opportunity to do the same
8 thing. And it, frankly, surprises me both
9 that Mr. Carroll is taking that position, but
10 also that he's taking that position without
11 even seeing what Dr. Singer has to say.

12 What we would propose is, whatever
13 the mechanism is, we would like to bring
14 before Your Honor the limited supplemental
15 opinion of Dr. Singer based on Mr. Orszag's
16 supplemental report. If Your Honor doesn't
17 want to consider that, then that would be Your
18 Honor's ruling. If Mr. Carroll wants to
19 oppose that, then that would be Mr. Carroll's
20 right.

21 JUDGE SIPPEL: Does the Bureau
22 have a position on this?

1 MR. KNOWLES-KELLETT: I don't
2 think so, Your Honor. It's a close one.

3 JUDGE SIPPEL: Thank you. That's
4 the advice I need.

5 (Laughter.)

6 JUDGE SIPPEL: No dog in the
7 fight, huh?

8 MR. KNOWLES-KELLETT: This is
9 complicated.

10 JUDGE SIPPEL: Yes, sir. That's
11 why we're all overpaid. Okay.

12 MR. SCHONMAN: Can I just say
13 something?

14 JUDGE SIPPEL: Yes, sir. Yes,
15 please.

16 MR. SCHONMAN: We've come through
17 a full week, and the idea is to make sure that
18 the record is as full and complete as
19 possible, so that you have in your arsenal
20 everything you need to make a reasoned
21 decision.

22 If there's a convenient way to get

1 in this last piece of information that doesn't
2 injure anyone, perhaps it's better to let it
3 in, and you can give it what weight you want.
4 If what we're talking about is the Tennis
5 Channel trying to show what someone else's
6 testimony does not include, I don't know that
7 they, necessarily, need additional testimony
8 in that respect. They can point out the
9 deficiencies in someone's testimony, or in
10 someone's report.

11 JUDGE SIPPEL: Well, that's --
12 well, in my experience, anyway, that's
13 generally the traditional way. If it is -- if
14 Mr. Schmidt has set it up as it really is, and
15 I don't -- I have no question to doubt your
16 word on it, but if that's all it is, is that
17 he said he was going to do Part A and Part B,
18 and he only did Part A, obviously, there's
19 nothing he says -- I can't make any findings
20 in his favor on Part B if he hasn't said
21 anything about it.

22 MR. SCHMIDT: Yes. And I think

1 that's accurate. The piece we're looking to
2 do is to say here's what Part B shows. If
3 you're going to look at what Mr. Orszag says
4 Part A shows, here's what Part B shows.
5 That's what we're trying to --

6 JUDGE SIPPEL: Well, hasn't the
7 doctor already said that in his first go
8 around? You told me he was complete, Dr.
9 Singer. So, then how does he have -- why does
10 he need to be more complete?

11 MR. SCHMIDT: Here's what
12 happened. When the FCC looked at this
13 question, they said Part A and Part B, we're
14 looking at four channels, G4, Style, Golf and
15 Versus. And they looked at those four for both
16 questions.

17 Mr. Orszag on the stand said I
18 have redone their analysis just looking at
19 Golf, and just looking at Versus, and it goes
20 away. It vanishes.

21 What we found out last night was
22 he was only talking about doing that analysis

1 for only Golf and Versus on Question A, not on
2 Question B. So, no one has looked just at
3 Golf and Versus on Question B, and that's what
4 we're trying to bring in through Dr. Singer.

5 JUDGE SIPPEL: Well, if it was an
6 oversight on his part then, obviously, then
7 Mr. Carroll has a position that has to be
8 listened to anyway with respect to whatever
9 that would be called, re-re-redirect or
10 something. I mean, but if it's just a -- if
11 that was a deliberate leaving out, if that was
12 a tactical leaving out, then it seems to me
13 that the record can stand as it is. I mean -

14 MR. SCHMIDT: And I think what Dr.
15 Singer would say to that is he accepted what
16 the FCC had done. On the day of his testimony
17 for the first time, Mr. Orszag attempted to
18 disentangle it, and to suggest that when you
19 disentangle it, it goes away.

20 Dr. Singer didn't agree with that,
21 and what he found is when you disentangle it
22 for the B question, it doesn't go away. That's

1 what's not in the record.

2 JUDGE SIPPEL: Well, then you've
3 got lots of leeway to comment on that in
4 proposed findings or in rebuttal. You've got
5 -- I don't -- from my standpoint, I don't
6 think I need anything more. But I do have one
7 question. Why was his deposition taken in the
8 first place, I mean, this late deposition?

9 MR. SCHMIDT: Because we were
10 given entirely new analyses for him the night
11 before he testified in the middle of the trial
12 after the deadline for the written direct.

13 JUDGE SIPPEL: I think I recall it
14 was one paragraph, or was it more than that?

15 MR. SCHMIDT: It was one
16 paragraph, but then when he got on the stand
17 it went much -- well, it didn't go beyond the
18 one paragraph. The one paragraph, as I read
19 it, essentially said I don't agree with what
20 Dr. Singer did. And when I look at the data,
21 it comes out differently. So, it was a very
22 broadly phrased paragraph.

1 When he testified on the stand
2 when Mr. Toscano asked him questions on
3 direct, he gave much more specific opinions
4 that we had never heard before. And our
5 argument at that time was exactly Mr.
6 Carroll's argument now. There has to be an
7 end. You can't bring a witness on the stand
8 when you've given that kind of disclosure that
9 night before, and introduce wholly new
10 opinions from that witness under the auspices
11 of saying they're rebuttal to Dr. Singer, when
12 some of them, in fact, were not even rebuttal
13 to Dr. Singer.

14 So, we objected at that time, and
15 our argument was he should not be able to do
16 that. And we will maintain that argument,
17 particularly if we're not allowed the same
18 fair opportunity that Mr. Carroll took for
19 himself.

20 He was allowed to give those
21 opinions. And I think what Your Honor said
22 was, you can go out and depose him, and then

1 we can recall him for the same subject matter.

2 We spoke to our colleagues on the other side

3 and set up the deposition for last night at

4 their request, and conducted the deposition.

5 And in advance of the deposition, they

6 requested that in light of Mr. Orszag's

7 personal situation, which I think Mr. Carroll

8 mentioned, that we just take the deposition,

9 that we not recall him live. And we said

10 absolutely, we're fine with that. Of course

11 we'll do that.

12 JUDGE SIPPEL: Okay.

13 MR. SCHMIDT: So, that's where we

14 find ourselves.

15 JUDGE SIPPEL: So, you would be

16 satisfied if you had the opportunity to

17 comment or rebut on what Dr. Singer comes in,

18 what he comes in with, basically.

19 MR. CARROLL: Well, that's going

20 to require a whole new deposition. I've never

21 seen this opinion. It wasn't -- this is the

22 first I'm hearing about the opinion. And,

1 apparently, he's not finished it. Apparently,
2 maybe he'll be finished tomorrow.

3 JUDGE SIPPEL: Well, it's
4 obviously something that couldn't be -- that
5 would have to be deferred.

6 MR. CARROLL: But, Your Honor,
7 what he's giving an opinion on is not
8 something Mr. Orszag did. It's just something
9 that he's now saying oh, here's another way
10 for me to support my original opinion in any
11 area Dr. Singer already testified about, and
12 was cross-examined by me. And I cross-examined
13 him based -- and remember, Dr. Singer's
14 opinion was new to me in the prior week.
15 That's how we got to Mr. Orszag. And I went
16 and crossed Dr. Singer. That was it, on the
17 understanding okay, Dr. Singer, you know the
18 FCC. You think you've done the work like --
19 you'll remember the cross.

20 JUDGE SIPPEL: And that was in
21 this case, it last -- started in 2009 --

22 (Laughter.)

1 MR. CARROLL: Exactly. And it was
2 pretty hard cross, and it all had to do with
3 the FCC.

4 JUDGE SIPPEL: Yes, it was.

5 MR. CARROLL: What he wants to now
6 do, as I understand it, is do something that
7 he could have done before, but he didn't do
8 before, that will help him enhance his opinion
9 related to the FCC story. The justification
10 for it, he now says well, Mr. Orszag in his
11 new opinion didn't do this other thing. Well,
12 they can argue that, if they want to argue
13 that. If they have an argument that Mr.
14 Orszag didn't do something else he should have
15 done, fine. But that doesn't excuse why Dr.
16 Singer didn't do it before, either. And I
17 don't think Dr. Singer should have, again, the
18 chance to come in here and cook us up another
19 one, and put me through the time after all
20 this ordeal. I'm trying to close down a
21 record here, of now getting a new report,
22 finding Mr. Orszag wherever he is, figuring

1 out what new regressions Dr. Singer has run,
2 and tracking him down and going getting
3 another deposition; all the while we'll be
4 holding up all the briefing schedule because
5 they want to do this. I just -- it's got to
6 come to an end. And I just think this one is
7 over the top.

8 MR. SCHMIDT: Every one of Mr.
9 Carroll's arguments, in fairness, apply to
10 exactly what they did with Mr. Orszag in terms
11 of their being a deadline for direct
12 testimony, both sides meeting that deadline
13 for direct testimony. And then bringing
14 something new in that purported to respond to
15 Dr. Singer but, in fact, included new analyses
16 that Dr. Singer had never purported to do, and
17 putting them before Your Honor on direct after
18 giving us the barest of notice about them.

19 So, from our point of view, and if
20 Your Honor would prefer, we'll put in a brief
21 on this issue, because I'm not sure it needs
22 to be resolved now. But from our point of

1 view, it should be equal, either Mr. Orszag's
2 new opinion stay out, and Dr. Singer's new
3 opinion stay, or they both come in.

4 The idea that they can't extend us
5 the same courtesy that we extended them, and
6 find time to take -- my deposition of Mr.
7 Orszag last night, I'm going to get it wrong,
8 I think it was -- I know it was less than two
9 hours. I think it was about an hour and a
10 half. The idea that they can't find an hour
11 and a half to sit down with Dr. Singer and ask
12 him about what will be a three-page opinion
13 with a couple of charts attached, that just
14 doesn't seem accurate to me, or right to me.

15 And the idea that it would disrupt
16 the briefing schedule where, frankly, the
17 briefing schedule to accommodate them is
18 already longer than we would want. It runs
19 all the way until the end of May just for the
20 first round of briefing. That just doesn't
21 seem right to me.

22 We've seen the number of lawyers

1 that both sides have on these cases. One
2 lawyer can find a day to prepare, just like I
3 did in the middle of trial, and a couple of
4 hours to depose Dr. Singer, and still take the
5 full month to write the papers that need to be
6 written.

7 MR. CARROLL: And the problem with
8 that is, you're supposed to be the claimant
9 who's proving a case. And now I've got a new
10 opinion, maybe Mr. Orszag should come back in
11 and be able to respond. And again, Your
12 Honor, the way we got here was Dr. Singer
13 started this with a new opinion that was never
14 reviewed before, less than a week before the
15 start of the trial, and we dealt with it. I
16 cross-examined him on it, notwithstanding that
17 it was new.

18 And what Dr. Singer now wants, and
19 I haven't heard counsel deny this, what he now
20 wants to opine on, whatever new it is, I
21 haven't seen it yet, is absolutely something
22 that he completely could have included in his

1 prior report. There's absolutely no
2 justification for the fact that he didn't do
3 whatever regression he's now running, zero
4 excuse.

5 And on Mr. Orszag's side, Mr.
6 Orszag had to respond, because I'm the
7 defendant in this, the respondent, had to
8 respond to Dr. Singer's new work. And I, of
9 course, extended the courtesy of saying with
10 respect to his rebuttal of Dr. Singer, which
11 was new stuff, of course you can have his
12 deposition.

13 Now, maybe, again, it's -- I hate
14 to end on an uncooperative note after a week
15 and some here, maybe we should have a little
16 brief on it, Your Honor, if it's helpful to
17 Your Honor. But I do object to the
18 presumption that you're going to put in an
19 expert report I haven't seen yet, and allow me
20 the chance to try and move to get it out.

21 I think that there should be at
22 least a motion, and a burden on your side to

1 justify why Dr. Singer could not have
2 submitted this new opinion previously that
3 he's now coming forward with.

4 MR. SCHMIDT: Let me be clear,
5 Your Honor. Mr. Carroll should have the
6 opportunity to object to a new report from Dr.
7 Singer if he thinks that it genuinely is
8 improper in some way. And I would not suggest
9 anything to the contrary.

10 My position is simply, the "new
11 opinion" that Dr. Singer gave was given within
12 the deadline. It was given in his written
13 testimony, and the reason it appeared in his
14 written testimony was because it drew on
15 materials regarding the merger order that were
16 not available previously, that we had motion
17 practice on to get some of those materials
18 from Comcast.

19 There's no surprise whatsoever
20 that we were going to rely on an opinion of
21 the FCC that Comcast including with respect to
22 these specific channels may have discriminated